UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILWAUKEE ART MUSEUM, INC.,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 18-RC-265466
	)	
DISTRICT LODGE 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	)	
	)	
Petitioner,	)	

EMPLOYER'S REQUEST FOR REVIEW

Employer, MILWAUKEE ART MUSEUM, INC. ("MAM"), pursuant to 29 C.F.R. § 102.67, requests that the National Labor Relations Board ("NLRB" or "Board") review the Regional Director's October 6, 2020 Decision and Direction of Election ("DDE") in the above-captioned matter.

INTRODUCTION

This proceeding arises out of an August 31, 2020 representation petition filed by Petitioner, District Lodge 10, International Association of Machinists and Aerospace Workers, ALF-CIO ("IAM"). *See* Board Ex. 1(a). It asks the NLRB to conduct an election among certain MAM employees, namely "[a]ll full-time and regular part-time professional and non-professional employees who are employed" by the Employer. *Id.*

MAM objected to the petition because, *inter alia*, the IAM already represents a unit of guards employed by MAM. Accordingly, MAM's positon was that the petition should be dismissed pursuant to 29 U.S.C. § 159(b)(3).

The Regional Director declined to dismiss the petition in her October 6, 2020 DDE. According to the Regional Director, the prohibitions contained in Section 9(b)(3) were not

implicated by the facts of this case because the IAM was recognized as representative of the guard unit *before* the IAM sought to represent the petitioned-for unit in this case. In support of that conclusion, the Regional Director relied upon the Board's 1948 decision in *E.R. Squibb & Sons*, 77 NLRB 84 (1948), which was applied with little or no further analysis by the Board in two additional decisions involving a similar fact pattern: *Pinkerton National Detective Agency, Inc.*, 90 NLRB 532 (1950) and *Dynair Services, Inc.*, 314 NLRB 161 (1994).

As set forth below, the Board should grant this request for review and dismiss the petition as barred by 29 U.S.C. § 159(b)(3). Neither the Regional Director's DDE, nor the Board's decisions in *E.R. Squibb*, *Pinkerton*, and *Dynair* correctly apply Section 9(b)(3)'s prohibitions. As the Board has recognized, "Congress designed Section 9(b)(3) to shield employers from being required to recognize and bargain with a union in circumstances where there was a potential conflict of loyalties involving guard employees." *Loomis Armored US, Inc.*, 364 NLRB No. 23, slip op. at 2 (2016) (citing *Wells Fargo Corp.*, 270 NLRB 787, 789 (1985), *rev. denied sub nom.*, 755 F.2d 5 (2d Cir. 1985), *cert. denied*, 474 U.S. 901 (1985)). Nothing in this principle turns on the order in which the guard and non-guard units are recognized or certified.

Given the purposes underlying Section 9(b)(3), the IAM's attempt to also represent other MAM employees must be rejected. Accordingly, MAM's request should be granted and the petition dismissed.

RELEVANT FACTS

They key facts here are undisputed. Petitioner seeks to represent a unit of employees at MAM. Board Ex. 1(a). Petitioner already represents a unit of guards at MAM. Transcript of Proceedings ("Tr.") 21; Jt. Exs. 1-3. The evidence introduced at hearing included labor contracts entered into between the Employer and the IAM for the time periods November 2017 to August

2020, and September 1, 2020 to August 31, 2023. *Id*. Undisputed testimony further established that MAM was first approached by Petitioner to voluntarily recognize the IAM for the petitioned-for unit by the same individual with whom MAM already deals regarding the existing guard unit. Tr. 21-22. That individual told MAM that Petitioner's first objective in bargaining would be to negotiate a pension for the employees it seeks to represent. *Id*. at 22.

THE REGIONAL DIRECTOR'S DDE

Given the foregoing facts, MAM argued that the petition should be dismissed because it violated Section 9(b)(3)'s prohibitions. MAM outlined the policy reasons that caused Congress to enact Section 9(b)(3) and further explained how the Board's prior decisions in *E.R. Squibb*, *Pinkerton*, and *Dynair* failed to take into account those considerations in allowing similar petitions to proceed to election. As MAM explained to the Regional Director, given the purposes that prompted the enactment of Section 9(b)(3), which the Board has acknowledged in other decisions, there was no reasoned basis for allowing petitions to proceed based on the order in which the union sought to recognize the guard and non-guard units.

The Regional Director's DDE recognized that Section 9(b)(3) "specifically precludes certifying a union which represents non-guards as the bargaining agent for a unit of guards." DDE at 4. However, citing *E.R. Squibb*, *Pinkerton*, and *Dynair*, the Regional Director found that Section 9(b)(3) "does not, on the other hand, bar the converse." *Id.* Rather, under *E.R. Squibb*, *Pinkerton*, and *Dynair*, the DDE found that the Board "has long held that 'the Act does not prohibit the Board from certifying a labor organization which itself represents guards as the representative of employees other than guards." DDE at 4-5 (quoting *Dynair*, 314 NLRB at 161 (citing *Pinkerton*, 90 NLRB at 533; *E.R. Squibb*, 77 NLRB at 84–85)). Thus, because "the converse" was at issue in this case, the Regional Director found no bar to the petition. *Id*.

The Regional Director further concluded that the policies that led Congress to enact Section 9(b)(3) did not lead to a contrary conclusion. According to the Regional Director, because the IAM was only seeking to represent a union of non-guards in this case, the prohibitions of Section 9(b)(3) were not "implicated." DDE at 7. Beyond this cursory discussion of the policies underlying Section 9(b)(3), the Regional Director simply reiterated her reliance on *E.R. Squibb*, *Pinkerton*, and *Dynair* in declining to dismiss the petition. DDE at 7.

APPLICABLE STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 102.67(d), the Board will grant a request for review only where, *inter alia*, "compelling reasons" exist "for reconsideration of an important Board rule or policy." *Id*. As set forth below, the Board's prior failure to interpret Section 9(b)(3) in accordance with the principles that led to its enactment represent such compelling reasons.

ARGUMENT

I. THE LANGUAGE OF, AND POLICIES UNDERLYING, SECTION 9(b)(3) REQUIRE DISMISSAL OF THE PETITION.

There is no dispute here that Petitioner seeks to represent a unit of employees at an employer where it already represents a unit of guards. Tr. 21-22; Jt. Exs. 1-3. It is also undisputed that such an arrangement cannot withstand scrutiny under Section 9(b)(3) and the policies that gave rise to that provision's addition to the NLRA. Accordingly, review should be granted and the petition in this proceeding must be dismissed.

Congress enacted Section 9(b)(3) principally because of the Supreme Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947). *Wells Fargo*, 270 NLRB at 787.[1]

[1] The Board in *Loomis* overruled the holding in *Well Fargo* regarding withdrawal of a voluntarily-recognized mixed guard unit. However, in doing so, the Board did not reject the extensive discussion in *Wells Fargo* regarding the impetus for Section 9(b)(3) and the policies underlying its enactment.

That case involved an NLRB proceeding where the Board required an employer to bargain with a certified guard unit, notwithstanding the fact that the union also represented *a separate unit* of production employees. *Jones & Laughlin*, 331 U.S. at 418–19. The Sixth Circuit denied enforcement of the Board's order, finding the guards' obligation to protect the employer's property was "incompatible with their obligations to the Union, which, since it represents production employees, authorizes and directs the strike." *NLRB v. Jones & Laughlin Steel Corp.*, 154 F.2d 932, 935 (6th Cir. 1946).

Following the Supreme Court's reversal of the Sixth Circuit, Congress enacted Section 9(b)(3). *Wells Fargo*, 270 NLRB at 788–89, n.9 (citing 93 Cong. Rec. S6444 (1947) (remarks of Sen. Taft)). Based on this legislative history, the Board in *Wells Fargo* held it was "clear…that Congress' purpose in enacting Section 9(b)(3) was to shield employers of guards from the potential conflict of loyalties arising from the guard union's representation of nonguard employees or its affiliation with other unions who represent nonguard employees." *Wells Fargo*, 270 NLRB at 789.

With this history and purpose in mind, it is clear that the petition in this case must be dismissed. Section 9(b)(3)'s two limitations—the "unit" and "union membership" restrictions[2]—should be applied to prevent the very occurrence that Section 9(b)(3) was designed to prevent. At a minimum, the facts here show that allowing the petition to proceed could result in the certification of a non-guard unit that would be "affiliated directly or indirectly" with a guard unit represented by the same labor organization. Tr. 21-22; Jt. Exs. 1-3. Given what the Board has recognized was Congress's clear purpose in enacting Section 9(b)(3), its limitation should not be given a reading that "effectively would thwart that congressional purpose." *Wells Fargo*, 270 NLRB at 789.

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[2] *Loomis*, 364 NLRB No. 23, slip op. at 8.

The only Board decisions to address the fact scenario at issue here fail to apply the interpretative principles the Board set forth in *Wells Fargo*. In *E.R. Squibb & Sons*, the Board found that Section 9(b)(3) did not prohibit certification of a non-guard unit even though the employer already recognized a guard unit represented by the same union. 77 NLRB at 85–86. However, the basis of that holding was simply one of sequencing—that is, since the guard unit was already recognized, Section 9(b)(3)'s limitations supposedly did not apply. *Id*. But this three-sentence analysis contains no consideration of any of the reasons underlying the enactment of Section 9(b)(3). And there is nothing in those policy underpinnings that turns on the semantics of which unit came into existence first. *See* discussion *supra*.

Equally lacking in persuasive reasoning are two other Board decisions that follow *E.R. Squibb*. Both *Pinkerton* and *Dynair* simply rely upon *E.R. Squibb*—in equally cursory opinions—without considering any of the underlying policy reasons for Section 9(b)(3) outlined above. *Pinkerton*, 90 NLRB at 533, n.5, n.6; *Dynair*, 314 NLRB at 161.

Given the Board's failure in these three brief decisions to meaningfully consider whether the rulings actually comported with the policy reasons underlying Section 9(b)(3), these decisions fail to substantively support allowing the petition in this case to proceed.

Indeed, the Board's more recent discussions of Section 9(b)(3) align with the policy objectives outlined above. As the Board in *Loomis* recognized, "[a]n employer's guards may be called upon to protect or enforce the employer's property rights against nonguard fellow union members engaged in protected activity against the employer." 364 NLRB No. 23, slip op. at 2. This policy statement acknowledges the risks that flow from "fellow *union* members"—not fellow *unit* members. *Id.* (emphasis added).

In a related vein, the Board in *Loomis*, in further discussing the reasons for enacting Section 9(b)(3), stated it was "prompted by a desire to shield employers from being required to enter into collective-bargaining relationships *covering units where guards might face a conflict of loyalties.*" 364 NLRB No., 23, slip op. at 5 (emphasis added). Nothing in this policy statement turns on whether the guard and non-guard employees are represented by the same union in a single unit. *See also Stay Security*, 311 NLRB 252, 252 (1993) (Section 9(b)(3) grounded in concerns about an employer's property rights).

Given these long-recognized policy reasons, the rationale for Section 9(b)(3)'s enactment should not be subverted by an interpretation that turns on the order in which the guard/non-guard units came into existence. Nor should Section 9(b)(3) be negated by a statutory construction that renders meaningless the very policy Section 9(b)(3) was supposed to promote.

Petitioner argued at hearing that the petition should not be dismissed because it did not seek to include guards and non-guards in the same unit. Tr. 37–38. In the first place, as outlined above, Section 9(b)(3) mandates dismissal of the petition, at a minimum, under its "affiliation" language. *See* discussion *supra*. But MAM also offered uncontroverted evidence that it was contacted regarding representation of the MAM employees at issue here by the same District Lodge 10 representative with whom it already deals regarding the existing MAM guard unit. Tr. 21–22. The District Lodge 10's representative's statement that the union intended to first negotiate a pension for the newly proposed bargaining unit, Tr. 22, belies any unsupported claim that Petitioner views these as separate bargaining units.

The Regional Director's DDE makes no effort to meaningfully address any of these points. Rather, she simply applied the cursory and flawed reasoning of *E.R. Squibb*, *Pinkerton*, and *Dynair* to conclude, based on the sequence of when the IAM sought to represent the non-guard units, that

"neither of the Section 9(b)(3) prohibitions concerning units that include guards are implicated in this case." DDE at 5. But because, as outlined above, *E.R. Squibb*, *Pinkerton*, and *Dynair* fail to apply Section 9(b)(3) in a manner consistent with the reasons that provision was enacted, the Regional Director's conclusion is equally flawed.

Equally unavailing is the Regional Director's separate attempt to consider the policies underlying Section 9(b)(3). DDE at 8–9. Again, the Regional Director's analysis simply returns, in circular fashion, to the same flawed conclusion: that because the IAM only sought certification of a non-guard unit in this case, the concerns that prompted Congress to enact Section 9(b)(3) allegedly are not implicated. But, as noted above, this interpretation simply negates the very policy that Congress intended to promote by enacting Section 9(b)(3).

As noted above, nothing in the reasoning that prompted Congress to enact Section 9(b)(3) turns on whether the guard and non-guard employees are represented by the same union in a single unit. Nor are those policy considerations only implicated when a union seeks to first represent a non-guard unit. There is no logic to the conclusion that those policy concerns somehow vanish when the "converse" order occurs, as in this case. Because neither *E.R. Squibb*, *Pinkerton*, and *Dynair*, nor the Regional Director's DDE, apply Section 9(b)(3) in a manner faithful to the reasons that statute was enacted, the Board should grant MAM's request for review and dismiss the petition.

CONCLUSION

For the foregoing reasons, MAM's request for review should be granted and the petition dismissed in its entirety.

Respectfully submitted,

MILWAUKEE ART MUSEUM, INC.

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CERTIFICATE OF SERVICE

The undersigned certifies that he caused a true and correct copy of Employer's Request for Review to be served upon:

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via electronic filing (Regional Director) and electronic mail (Petitioner's Representative), this 20th day of October, 2020

_____/s *Joseph J. Torres*_____
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